

# 9

## The Compatibility of Justice for Women with *Jus Post Bellum* Analysis

*Fionnuala Ní Aoláin and Dina Haynes\**

### I. Introduction

Over the past quarter-century, many countries have experienced deeply divisive and highly destructive conflicts, a number of which have then been subject to international intervention and ensuing post-conflict reconstruction initiatives. Most of these international ventures have an in-country presence from the pre-negotiation phase through to the post peace agreement phase, and often into a development phase, resulting in de facto expansions of international administration in the period after conflict's formal conclusion.<sup>1</sup>

While societies rarely have the opportunity to revisit and remake their basic social, political, and legal compacts, countries emerging from conflict provide multiple opportunities for transformation on many different levels, opportunities uncommon in stable and non-transitional societies. Such potentially transformative moments are so infrequent that their occurrence helps explain our preoccupation with societies that have been deeply and cyclically violent.<sup>2</sup> It also explains why some feminists view transitional opportunities as particularly important to groups that have been marginalized, underrepresented, and discriminated against, even while others are more reserved, wary of the vision of empire that submerges “international conflict feminism” into a broader imperialist project in sites of post-conflict nation building, and caution against over-optimism.<sup>3</sup> Among the many risks for women, there is the ever-present danger that the transformation from “conflicted” to “peaceful” risks being partial and exclusionary with the transition process itself operating to cloak women's ongoing repression and inequality. Because of the transformative potential in this moment—for women in particular and for gender relations more generally—and given the critical roles that international interveners can play in these transformations, it is crucial to understand,

\* Professor of Law University of Minnesota Law School and Transitional Justice Institute University of Ulster and Professor of Law New England Law School. Professor Ní Aoláin acknowledges the support of the British Academy in enabling the completion of this research.

<sup>1</sup> Ralph Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press 2008).

<sup>2</sup> “Conflict can provide women with opportunities to break out of stereotypes and stifling societal patterns [. . .] If women seize these opportunities, transformation is possible. The challenge is to protect the seeds of transformation sown during the upheaval and to use them to grow the transformation in the transitional period of reconstruction.” UN Women, “Progress of the World's Women (2011–2012): In Pursuit of Justice” (Report, UN Women 2011) 81 (quoting Anu Pillay).

<sup>3</sup> Vasuki Nesiah, “Feminism as Counter-Terrorism: The Seduction of Power” in Margaret L. Satterthwaite and Jayne C. Kirby (eds), *Gender, National Security and Counter-Terrorism: Human Rights Perspectives* (Routledge 2013) 133.

support and reframe post-conflict reconstruction processes for women. If *jus post bellum* constitutes, in part, an extension of the just war theory which looks to both “the justness of the war and the justness of the way that war was fought,”<sup>4</sup> a key question for feminist scholars is how and where do women fit in the antecedent and constituting doctrines? If for some, *jus post* requires a peace that is an improvement on the situation prior (to war), or creates some obligations for the parties to a conflict when a state is conquered or defeated, how might such obligations translate into practical effect for women? Our initial response is skepticism that another normative framework can substantively change the legal or political calculus for women, and fear that it may merely clutter the legal landscape, with the overall outcome of less rather than more legal enforcement for women. Our skepticism is also connected to unearthing the genealogy of the *jus ad* and *jus in* traditions, with their consistent lack of attention to gender as a relevant category of analysis or in disaggregating the modalities and costs of war to women.

This chapter will explore the utility of a *jus post bellum* conceptual framework in tackling gender issues in post-conflict transitions. Part I confronts the question of legitimacy—addressing the complexity of utilizing the post-conflict moment to advance the interests of women. Part II addresses the relationship between post-conflict reconstruction, gender justice, and a *jus post* framework of analysis. We specifically assess the practices of post-conflict reconstruction where some considerable gender mainstreaming efforts have been made by states and international institutions, speculating whether such form and substance can or should be grafted onto the *jus post* approach. Part III is concerned with teasing out what patriarchal baggage resides in the *jus post* placeholder, and identifying the gender blind spots of this emerging discourse. We address what “work” the concept is doing as identified by scholars and policy-makers, and whether the framework attends to the range and forms of issues that have been identified as “of concern to women” in the aftermath of armed conflict. Part IV imagines what *jus post* might add to this work. In conclusion, the chapter adopts a questioning stance on the extent to which a juridical framework comprised of a deep reach into a law of war framework that remain deeply exclusionary for women and whether mindfulness of gender during war’s activation, regulation, and closure can mitigate those limitations or transcend them. We are not so naive as to suppose that any legal framework provides a silver bullet solution to regulating women’s lives during and after conflict, but we recognize the “need to examine the distributive and ideological implications of different legal architectures.”<sup>5</sup>

## II. Utilizing the Post-Conflict Temporal Period to Advance Women’s Interests and Positioning

At the outset, we must acknowledge a certain wariness in attempting to apply an under-defined concept *jus post bellum* to the issues with which we are concerned.<sup>6</sup> Justice for women in general, what “justice” means for and to women, and the extent to which the gendered nature of conflict, and the programs and policies undertaken

<sup>4</sup> Gary J. Bass, “Jus Post Bellum” (2004) 32 *Philosophy and Public Affairs* 384.

<sup>5</sup> Nesiiah, “Feminism as Counter-Terrorism” (n. 3) 140.

<sup>6</sup> We note that a number of feminist scholars working in other disciplines have sought to engage with the relationship between feminist and just war theorizing. See e.g. Laura Sjoberg, “Why Just War Needs

in its aftermath, may necessitate different solutions and outcomes for women than for the “gender neutral” citizen commonly employed as a the post-conflict Everyman. As scholars have unequivocally affirmed, the idea of justice can be spelled out in many different ways, and such distinctions have important consequences in post-conflict societies.<sup>7</sup>

In post-conflict settings the justice in play can be alternatively retributive, restitutive, and compensatory, sometimes with all three combinations working in tandem. A gender perspective asks how, precisely, the distributive weight of justice in any of its forms is allocated. With a focus on transition, Bell and O’Rourke have aptly captured that there is much in particular to be gained from an emphasis on distributive justice for women—a facet frequently overlooked by feminist scholars and post-conflict theorists alike.<sup>8</sup> For that reason, our analysis pays particular attention to the presence or absence of distributive justice in any *jus post* conceptualization. In general, we start from the premise that close attention to gendered justice is critical to any evaluation of what *jus post bellum* brings for women.

### A. Legitimacy

We acknowledge that our own primary premise—that the post-conflict moment is generally an apt one for examining and potentially improving women’s status and daily lives—is not without critics or complexity.<sup>9</sup> First, the international presence within, and concomitant institutional validation of, the post-conflict arena may mean that the will to reform and transform serves to displace wide-ranging questions that would otherwise be asked about the morality of armed conflict itself.<sup>10</sup> There are a variety of feminist perspectives on the morality of war,<sup>11</sup> but it remains true that the “popular conception and actual practice alike align women with peace and pacifism.”<sup>12</sup> Feminist scholars have pithily noted in other post-war regulatory contexts that the trade-off on protection in conflict and inclusion in peace may well involve a deeper disengagement from the capacity to critique the engagement in armed conflict itself.<sup>13</sup> The post-conflict setting is one where the impulse to remedy the excesses of war by way of accountability,

Feminism Now More than Ever” (2008) 45 *International Politics* 1; Marian Eide, “‘The Stigma of Nation’ Feminist Just War, Privilege and Responsibility” (2008) 23 *Hypatia* 48.

<sup>7</sup> Jon Elster, “Justice, Truth, Power” in Rosemary Nagy, Jon Elster, and Melissa S. Williams, *Transitional Justice* (NYU Press 2012) 78.

<sup>8</sup> Christine Bell and Catherine O’Rourke, “Does Feminism Need a Theory of Transitional Justice?” (2007) 1 *International Journal of Transitional Justice* 23–44.

<sup>9</sup> See e.g. Karen Engle, “‘Calling in the Troops’: The Uneasy Relationship Among Women’s Rights, Human Rights and Humanitarian Intervention” (2007) 20 *Harvard Human Rights Journal* 189; Janet Halley, “Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law” (2009) 30 *Michigan Journal of International Law* 1.

<sup>10</sup> Lucinda J. Peach, “An Alternative to Pacifism? Feminism and Just War Theory” (1994) 9 *Hypatia* 152, 153.

<sup>11</sup> See e.g. Jean Bethke Elshtain, *Women and War* (University of Chicago Press 1987); Sara Ruddick “Pacifying the Forces: Drafting Women in the Interests of Peace” (1983) 8 *Signs* 471.

<sup>12</sup> Peach, “An Alternative to Pacifism?” (n. 10) 153.

<sup>13</sup> Diane Otto, “The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade” (2009) 10 *Melbourne Journal of International Law* 11.

reform, reparation, and mediation should not obscure the dilemma of validating the forces, institutions, and individuals that have been causal to the creation of communal violence. Articulating this paradox for the advancement of women's interests in the post-conflict moment underscores a broader tension in the relationship between *jus ad* and *jus post bellum*.<sup>14</sup>

Second, there is certainly a range of complexities in post-conflict sites, but some of them portend more risk for women. For example, ending conflict often includes emerging mediated relationships between domestic elites; these can involve dominance, recalibration and perceived increases in or loss of status and political power for women and for minorities. In commenting on nascent efforts by the international community to engineer post-conflict processes aimed toward improving women's lives, we are mindful of the hazards that abound, when, for example, interveners insert themselves into the role of "savior" while essentializing some locals caught in conflict—particularly women—as "victims."<sup>15</sup>

A parallel, and third critique pinpoints the western imperialism implicit in the wide-ranging enterprise of post-conflict reconstruction.<sup>16</sup> It identifies the reproduction of colonial dialogues in cajoling the local population to move forward in defined ways, the emphasis on technocratic nation building, and the reproduction of social and political orders without reference to place, population, or local preferences.<sup>17</sup> Michael Ignatieff's celebration of nation building initiatives, for example, described as a "global hegemony whose grace notes are free markets, human rights and democracy,"<sup>18</sup> can also be understood as humanitarian empire building where the benefits and burdens are invariably distributed inequitably. We argue that those who control and shape these post-conflict processes are typically male and invariably elite local, state, non-state, and international institutional actors. In recent past practice, they have often systematically erased women as meaningful participants and agents from the post-conflict terrain.

Fourth, when international actors become aware of women's efforts to be included in conflict ending processes and acknowledge their obligations to assist with that inclusion,<sup>19</sup> there is evidence of a pattern that shunts women into soft roles as participants within civil

<sup>14</sup> Citing George W. Bush on the reconstruction of Germany and Japan after the Second World War, "After defeating enemies, we did not leave behind occupying armies, we left behind constitutions and parliaments." Bass, "Jus Post Bellum" (n. 4) 385.

<sup>15</sup> Makau Mutua, "Savages, Victims, and Saviors: The Metaphor of Human Rights" (2001) 42 *Harvard International Law Journal* 201. A riff on that note has framed the military intervention of western states as premised on "saving" local women from local misogynistic men, reproducing age old vocabularies of "saving brown women from brown men."

<sup>16</sup> David Chandler, *Bosnia: Faking Democracy After Dayton* (Pluto Press 1999).

<sup>17</sup> Dina Francesca Haynes, "The Deus ex Machina Descends: The Laws, Priorities and Players Central to the International Administration of Post-Conflict Bosnia and Herzegovina" in Dina Francesca Haynes (ed.), *Deconstructing the Reconstruction* (Ashgate 2008). For more on critiques of heavy-handed post-conflict interventions, see also Fionnuala Ní Aoláin, Dina Francesca Haynes, and Naomi Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (Oxford University Press 2011) (*On the Frontlines*) intro and ch. 4.

<sup>18</sup> Michael Ignatieff, "The American Empire: The Burden" *New York Time Magazine* (New York, 5 January 2003).

<sup>19</sup> Resolution 1325 mandates a set of inclusion requirements for states and other international actors. UN Security Council (UNSC) Res. 1325, Resolution on Women, Peace and Security (2000), UN Doc. S/RES/1325 (31 October 2000).

society movements rather than at the negotiation table itself.<sup>20</sup> While recent efforts to include women in post-conflict negotiation processes have succeeded in increasing the number of women present, there is still marginalization of these women, who have undertaken sometimes extraordinary efforts to become visible to the decision-makers in the transitional process.<sup>21</sup>

Like Vatanparast writing in this volume, we are concerned that *jus post bellum* framing allows for manipulation by elite actors and norm entrepreneurs, in tandem with embedding and legitimating neo-colonial projects through law. We assert, nonetheless, that it is critical to harness the potential to create opportunities and capture improvements for women that might otherwise never exist. In this effort, one might characterize our approach as deeply pragmatic. While all interventionist approaches have obvious drawbacks (lacking, for example, legitimacy and longevity unless there is local ownership and “buy in”),<sup>22</sup> not intervening at all, doing so too softly, or placing “women’s issues” too far down on the agenda of intervention and post-conflict priorities also bears significant risk. Inaction during transition can leave women at a loss for substantial rights protection at a time when the rights of individuals are most likely to be considered and formulated or reformulated.<sup>23</sup>

If a *jus post bellum* framework is one that optimizes and makes clearer the legal and political frames that apply in post-conflict settings, an important dimension of its utility to women would be the extent to which any such consolidation recognizes how conflict affects men and women differently, and prioritizes equality gains for women. Similarly, if the goal of a *jus post bellum* framework is coherency and completeness of the post-conflict reconstruction terrain, then an obvious set of questions arises as to the comparative benefits of coherency versus fragmentary legal systems. As one of the authors has asked elsewhere, “do the presumed benefits of a unitary, cohesive system of international law really accrue to women? When fragmentation occurs and legal regimes multiply do women benefit? If so, how?”<sup>24</sup> Feminists and those interested in gender in post-conflict would do well to pause and reflect on the state of the *jus post bellum* field,<sup>25</sup> and consider: How best to proceed? How can feminists avoid the constant difficulty of catching up while an emerging field expands? How could a feminist vision of *jus post bellum* be framed that is not only responsive to expansion and opportunity but could actually frame the basis of engagement on its own terms? How would a

<sup>20</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) ch. 10; Dina Haynes, Fionnuala Ní Aoláin, and Naomi Cahn, “Women in the Post-conflict Process: Reviewing the Impact of Recent UN Actions in Achieving Gender Centrality” (2012) 11 *Santa Clara Law Review* 101.

<sup>21</sup> See Johanna E. Bond, “Gender, Discourse, and Customary Law in Africa” (2010) 83 *Southern California Law Review* 509 (2010).

<sup>22</sup> See also Haynes, “The Deus ex Machina Descends” (n. 17) 13 (discussing “governance by fiat”).

<sup>23</sup> See e.g. Theodora-Ismene Gizelis, “A Country of Their Own: Women and Peacebuilding” (2011) 28 *Conflict Management and Peace Science* 522, 524 (“UN operations can do better to ensure successful long-term peace than purely domestic alternatives and international involvement without the UN”).

<sup>24</sup> Fionnuala Ní Aoláin, “International Law, Gender Regimes and Fragmentation: 1325 and Beyond” in Cecilia M. Bailliet (ed.), *Non State Actors, Soft Law and Protective Regimes* (Cambridge University Press 2012).

<sup>25</sup> On the “state of the field” in transitional justice discourses, see generally Christine Bell, “Transitional Justice, Interdisciplinarity, and the State of the ‘Field’ or ‘Non-Field’” (2009) 3 *International Journal of Transitional Justice* 5.

feminist vision incorporate non-hegemonic practices and be aware of the complexities and contradictions of its own dominant discourses?

## B. Post-conflict reconstruction: language and motif

If one aspect of the *jus ad bellum* motif is an extension of justness into the post-conflict phase,<sup>26</sup> the quality and outcomes of post-conflict re-construction then falls squarely into a *jus post bellum* framework. Post-conflict reconstruction can be said to describe the collection of programs created and administered by various international organizations and their local partners in the period immediately following the formal legal conclusion of armed conflict. There is frequently, but not inevitably, an overlap with the application of local and international transitional justice mechanisms and processes in play. In trying to understand how *jus post* differs or compares to post-conflict reconstruction, we can look to Larry May's concept of *jus post*, which focuses on the "rebuilding" of a state.<sup>27</sup> From a methodological point of view, we start with some linguistic parsing. The idea of "re" building presumes a putting back together of that which is broken or destroyed, as does "re" construction. It is difficult to argue with the urgent necessity to bring order and structure back to societies whose physical and social infrastructure has been destroyed by communal violence. Yet, the comforting implication of the terminology presumes a going to back to things as they were before, and this is where "post-conflict reconstruction" frequently falls short. First, the call to reconstruct the pre-conflict order can be a slippery slope for women,<sup>28</sup> risking a return to status quo ante. Presumptions of the status quo ante also are largely played out on realist terms as a politics of power, security, and order.<sup>29</sup> This approach has consistently ignored what Porter has termed a "politics of compassion," in which there is attentiveness to the needs of vulnerable persons who have experienced suffering, an active listening to the voices of the vulnerable and open, compassionate and appropriate responses to particular needs.<sup>30</sup>

And yet, much of post-conflict work is deaf to determining what women and other vulnerable persons who have suffered want in terms of the post-conflict justice devised and meted out for them by local and international elites. For example, in a study undertaken in the eastern Congo, more than 2,600 people (half of whom were women) stated that their highest individual priorities were peace, security, and livelihood concerns (money, education, food, and health).<sup>31</sup> Transitional justice, which has been historically

<sup>26</sup> Note, for example, the language of Former President Jimmy Carter in response to the war in Iraq emphasizing the relationship between the just war tradition and post-war responsibilities: "The peace it establishes must be a clear improvement over what exists." Jimmy Carter, "Just War—or Just a War?" *The New York Times* (New York, 9 March 2003) 13.

<sup>27</sup> Larry May, *After War Ends: A Philosophical Perspective* (Cambridge University Press 2012) ch. 1 (defining the terrain as "governing practices after war ends").

<sup>28</sup> But see Ana Maria Munoz Boudet, Patti Petesch, and Carolyn Turk, "On Norms and Agency Conversations about Gender Equality with Women and Men in 20 Countries" (Report, World Bank 2012).

<sup>29</sup> Elizabeth Porter, "Can Politics Practice Compassion" (2006) 21 *Hypatia* 97.

<sup>30</sup> Porter, "Can Politics Practice Compassion" (n. 29) 97.

<sup>31</sup> Patrick Vinck and Phuong Pham, "Ownership and Participation in Transitional Justice Mechanisms: A Sustainable Human Development Perspective from Eastern DRC" (2008) 2 *International Journal of Transitional Justice* 398, 399.

premised on achieving accountability and underpinned by the notion of “punishing those responsible” was ranked as *the eighteenth* priority. The authors of the study concluded that “transitional justice must be integrated within a broader social, political, and economic transition to provide for basic needs and protection.”<sup>32</sup> A similar survey in Uganda, conducted shortly after a peace agreement was signed there, found that survey participants’ highest priorities were health (45 percent), peace, education, and livelihood issues (food and land), with seeking justice, at a mere three percent, as a much lower priority.<sup>33</sup> Indeed, when asked to consider what should be done for the victims of wartime violence, 51.8 percent of the respondents said that victims should be given financial compensation and 8.2 percent said victims should be given cattle and goats (for a total of 60 percent of financial or material compensation), with only 1.7 percent indicating that victims should be given “justice.”<sup>34</sup> When women in refugee camps in Darfur, who had previously experienced sexual violence, were asked what they needed to move forward, they replied “food security.”<sup>35</sup>

Empirically it seems that a substantial percentage of women deem (when asked), that justice in post-conflict contexts includes not just criminal and civil accountability (rights-based justice) but also assistance of the kind traditionally associated with development aid. This assistance, which falls somewhere between the mandates of those engaged in humanitarian aid and development, and which elsewhere we have described as “social services justice,”<sup>36</sup> is received more in the form of “healing” justice, because it focuses on providing critical social services to facilitate all aspects of post-conflict reconstruction.

As our work and that of other scholars has noted, conflicts sometimes produce surprising results for women. They are paradoxically contexts in which the social flux of violence provides access to public space, working opportunities, augmented political responsibilities, social activism, and greater gender equality.<sup>37</sup> The rub may come at the end of conflict, in the *jus post* phase when women see the gains that they have made through a time of social flux lost in the re-construction and re-building phase. Hence, we approach “re”-building with some gender-aware caution, and underscore our position that the re-distributive elements of any gender justice analysis demands nuanced recognition that conflicts can produce some gendered resource equalization, which may be lost by crude post-conflict liberal market driven “reforms.”<sup>38</sup>

<sup>32</sup> Vinck and Pham, “Ownership and Participation in Transitional Justice Mechanisms” (n. 31) 409.

<sup>33</sup> Phuong Pham et al., “When War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda” (Report, UC Berkeley Human Rights Center 2007) 3, 22.

<sup>34</sup> Pham et al., “When War Ends” (n. 33) 35.

<sup>35</sup> Physicians for Human Rights, “Nowhere to Turn: Failure to Protect, Support and Assure Justice for Darfuri Women” (Report, Physicians for Human Rights 2009) 2 <[https://s3.amazonaws.com/PHR\\_Reports/nowhere-to-turn.pdf](https://s3.amazonaws.com/PHR_Reports/nowhere-to-turn.pdf)> (accessed 22 July 2013).

<sup>36</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) 11.

<sup>37</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) chs 2, 5 and 10; see also Georgina Waylen, *Engendering Transitions: Women’s Mobilization, Institutions and Gender Outcomes* (Oxford University Press 2007) 6–9; Marsha Greenberg and Elaine Zuckerman, “The Gender Dimensions of Post-Conflict Reconstruction: Challenges in Development Aid” in Tony Addison and Tilman Bruck, *Making Peace Work: The Challenges of Social and Economic Reconstruction* 101 (Palgrave Macmillan 2009) 5.

<sup>38</sup> See e.g. Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) ch. 10. It also underscores a broader analytical point by feminist scholar Danielle Poe that the failure of just war theory to account for the fullness of war’s costs has broader implications, not least that an ethic of difference ought to infuse our understanding

Second, as a construct for improving women's lives during and after the political, economic, and social transitions that often follow war, post-conflict reconstruction has some evident weak points. For example, it is distinctly "emergency" focused.<sup>39</sup> The people who work in the organizations and agencies post-conflict have often been present during the war and into the early days after formal cessation of hostilities. As a consequence, they are accustomed to operating in emergency mode, and so fail to adjust to longer-term strategizing and thinking even long after the emergency phases have passed.<sup>40</sup> As a result of this incessant focus on reacting, rather than planning, and reacting only to the next urgent issue risking security, women's needs often figure in marginal and highly stereotyped ways. Most often this manifests as a sole focus on physical protection of women, and even then, as we have argued elsewhere, not often well done.<sup>41</sup> This sort of stylized approach fails to take account of "an ethics of sexual difference" in the post-war moment and its implications for the ordering of post-conflict settings.<sup>42</sup> Third, the outlines for most post-conflict programs are negotiated during peace talks where women have historically had scant representation.<sup>43</sup> Fourth, the programs defined during the peace accords, and refined by the international organizations carrying them out, typically focus heavily on civil and political rights, which may not align with women's priorities for post-conflict gains, and may result in skewed distributional effects, with perceptible gender effects.<sup>44</sup>

Ben-Porath, among others, has argued cogently that an ethics of care and dependence, if fused into the post-war arena, would fundamentally realign our understanding and re-prioritization of *jus post bellum*.<sup>45</sup> In this thinking, post-war deliberations should include relational considerations and the interconnectedness of responsibilities to address the consequences of armed conflict. Such theorization seeks to mitigate the perceived harms of humanitarian intervention, peacekeeping, and international administration, and to fundamentally realign how we conceive substantively and procedurally of post-war reconstruction.<sup>46</sup> But it remains unclear how, if at all, a *jus post bellum* analysis shifts some of the identified challenges and avoids the stated pitfalls. Moreover, we remain unconvinced that the post-conflict terrain requires a new conceptual placeholder of *jus post bellum* to do the work, rather than to address these issues of substance and process in their distinct and different legal and political fields.

of just war theory with implications for post-war settlements. See Danielle Poe, "Replacing Just War Theory with an Ethics of Sexual Difference" (2008) 23 *Hypatia* 33, 45–6.

<sup>39</sup> Diane Otto, "Remapping Crisis Through a Feminist Lens" in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart 2011) 75.

<sup>40</sup> Haynes, "Deus ex Machina" (n. 17).

<sup>41</sup> Haynes, Ní Aoláin, and Cahn, "Women in the Post-conflict Process" (n. 20).

<sup>42</sup> Poe, "Replacing Just War Theory" (n. 38) 45–6.

<sup>43</sup> Christine Bell and Catherine O'Rourke, "The Impact of UNSC Resolution 1325 on Peace Processes and Their Agreements" (2010) 59 *International and Comparative Law Quarterly* 1.

<sup>44</sup> See Zinaida Miller, "Effects of Indivisibility: In Search of the 'Economic' in Transitional Justice" (2008) 2 *International Journal of Transitional Justice* 266.

<sup>45</sup> Sigal Ben-Porath, "Care Ethics and Dependence—Rethinking Jus Post Bellum" (2008) 23 *Hypatia* 61.

<sup>46</sup> The analysis draws heavily on Joan Tronto's work arguing for instituting an ethics of care and reconstructing the political system to reflect an anti-elitist, participatory claim for ending dependency. See Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge 1993).

### C. Gender centrality

Having introduced the notion that conflict affects both men and women, but sometimes differently, we want to affirm the importance of a gender lens focused on post-conflict processes, because the value of a gendered assessment remains contested. In the legal and political space of ending or transmuting conflict, women still struggle to assert the magnitude of issues that affect them directly. They remain subordinated by dominant discourses that minimize or ignore the value of placing the needs and views of women at the center of the conversation about ending violent communal behaviors, even though such placement is absolutely central to ending societal violence.<sup>47</sup> It needs constant restatement that women are the group most historically marginalized and excluded from the peacemaking and peacebuilding processes across all jurisdictions and conflicts.

There are well-acknowledged gender gaps in existing legal frameworks applicable to post-conflict settings, including the law of armed conflict, international criminal law, and international human rights law. In all these sites, significant but incomplete conceptual and practical work has been undertaken (and remains ongoing) to address deficits, incentivize compliance, and shore-up enforcement.<sup>48</sup> It is insufficient, but it is a start. Given the relative youth of such efforts, we underscore our skepticism that such a variety of legal and political responses can be fully embedded and resolved in emerging *jus post bellum* discourses, or that there has been a substantial commitment by the norm entrepreneurs in the field to frame them with an embedded sense of gender justice.

We assert, instead, that applying a gender lens to conflict and its aftermath, regardless of the doctrine employed, helps us recognize that understanding women's needs must become central to conflict resolution, peacekeeping, reconstruction, and reconciliation efforts. As we have argued elsewhere,<sup>49</sup> merely integrating gender practices into post-conflict process already underway is insufficient unless gender is incorporated into all aspects and levels of the newly developing or rehabilitating state. It is also insufficient to rely solely on formal legal norms alone, be they *jus post* driven or any other, to confront the gender inequalities, violence, and discrimination that women may have experienced during conflict, or for women to be given a place merely within civil society post-conflict institutions. Law alone cannot do the work.

Rather, a broadly framed set of imperatives is required which includes, but does not rely solely on, legal reform to address harm and exclusion. For example, where women have predominantly come into view in recent post-conflict legal arenas it has been as an instrumental means to hold war crimes perpetrators accountable for sexual violence.<sup>50</sup> While not undermining per se the credibility and value of such accountability mechanisms, it should be clear that this slice of woman-centered concern limits

<sup>47</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) ch. 2.

<sup>48</sup> See e.g. Lara Stemple, "Human Rights, Sex, and Gender: Limits in Theory and Practice" (2011) 31 *Pace Law Review* 824; Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart 2005); Christine Chinkin, "Feminist Interventions into International Law" (1997) 19 *Adelaide Law Review* 13; Haynes et al., "Women in the Post-conflict Process" (n. 20).

<sup>49</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17).

<sup>50</sup> Karen Engle, "Feminism and its (Dis)contents Criminalizing Wartime Rape in Bosnia and Herzegovina" (2005) 99 *American Journal of International Law* 778.

what we understand about the gendered dynamics of any conflict and its post-conflict processes and laws. Moreover, we cannot hope to dislodge practices of violence towards women (before, during, and after conflict) unless we are prepared to confront a broader array of socially embedded violence.

### III. What Work Does *Jus Post Bellum* Do in Post-Conflict Settings?

*Jus post bellum* can be regarded as a reasonably new conceptual placeholder containing the idea that there is an emerging and coherent body of legal norms applicable to the post-conflict arena.<sup>51</sup> In addressing the notion of an existing and consistent notion of “justice” in the post-conflict showground—we must first generally ascertain what norms we have now, how effective they are, and what augmentation, if any, is required.<sup>52</sup> In this vein, we pay particular attention to the danger that *jus post bellum* “is not a properly universal [concept] as its development has privileged the experiences of men over those of women.”<sup>53</sup> In this context, we draw on a substantial strain of feminist analysis directed at critique and reformulation of both *jus ad bellum* and *jus in bello* frameworks.<sup>54</sup> Second, we are acutely aware of a substantial literature that confirms the search for universal, abstract, and hierarchical standards as associated with and driven by masculine modes of reasoning, with distinct application to universalist and absolutist legal frameworks in international law.<sup>55</sup> There is an acute hazard, then, that *jus post bellum* also bestows privilege to a set of norms that capture what is important to men about justice in post-conflict settings, but may not equally address what is important to women. Finally, reflecting on the gendered dimensions of any *post bellum* framework, some obvious methodological questions arise.<sup>56</sup> They include questioning whether gender analysis emerges in response to an existing set of generally agreed norms, which means that the discourse presumes its own gender neutrality, but also, because it is established, that gender consciousness is to be integrated from the outside in.

<sup>51</sup> May, *After War Ends* (n. 27). Some early glimpses of a *jus post* analysis are found in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (Basic Books 1992) 123.

<sup>52</sup> There has been little if any analysis addressing what a feminist *jus in bello* might look like. The closest perhaps is the work of feminist international relations security scholars such as Laura Sjoberg’s language of “empathetic war-fighting” to describe the foregrounding of individual responsibility with the impact of war. Laura Sjoberg, “The Paradox of Double Effect: How Feminism Can Save the Immunity Principle” (2006) *Boston Consortium on Gender, Security and Human Rights Working Paper* 31.

<sup>53</sup> See Hilary Charlesworth and Christine Chinkin, “The Gender of *Jus Cogens*” (1993) 15 *Human Rights Quarterly* 63, 65.

<sup>54</sup> See, inter alia, Laura Sjoberg and Jessica Peet, “A(nother) Dark Side of the Protection Racket” (2011) 13 *International Feminist Journal of Politics* 163; Eide, “The Stigma of Nation” (n. 6).

<sup>55</sup> Eide, “The Stigma of Nation” (n. 6) 56, drawing on Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press 1982)

<sup>56</sup> Feminist scholars have frequently paused to reflect on the “gender” of international law doctrines and to wonder at the “structure of concept detailed by international law scholars.” This article follows that line of inquiry. See Charlesworth and Chinkin, “The Gender of *Jus Cogens*” (n. 53); in the context of the doctrine of self-determination, feminist scholars have noted how, for example, “the oppression of women has never been considered relevant to the validity of [a group’s] claim or to the form self-determination should take.” Christine Chinkin, “A Gendered perspective to the Use of Force in International Law” (1992) 12 *Australian Yearbook of International Law* 279 (1992); Charlesworth and Chinkin, “The Gender of *Jus Cogens*” (n. 53) 73.

It has been argued, for example, that “[o]ne important difference between *jus ad bellum* and *jus in bello* on the one hand, and *jus post bellum* on the other, is that the law is fairly settled as to the prior two categories.”<sup>57</sup> This position has some derivative consequences, and the presumption of settled law comes with some substantial gender baggage. First, women’s interests have fared notoriously badly in the regulation of violent conflicts between states. Armed confrontation between states has generally been carried out by male combatants (with exceptions, as we acknowledge). The applicable laws of war were also generally constructed from the vista of the soldier’s need for ordered rules within which to wage war on behalf of the state. Historically the focus lay in defining the fields of action for the soldier (including exclusions of acts and targets) rather than on recognizing harms with consequent liabilities caused by state actors during conflict. All this in turn meant that until relatively recently, the locales and personalities of injury towards women in situations of conflict were places where neither law nor recorded narrative entered.

Second, the lack of harm elaboration means any presumption that *jus ad bellum* and *jus in bello* adequately address the violence lawfully permitted in war starts from a gendered blind spot. Logically, if the legal terrain of *jus post bellum* follows from the frameworks of *jus ad bellum* and *jus in bello*, then one must, from a gendered perspective, account for the gendered limitations of the derivative frameworks. The degree of gender exclusion, blind spots, and omissions will invariably affect how one quantifies the value of the *jus post bellum* discourse to addressing the gendered dimensions of armed conflict and its aftermath.

Our primary concern is that *jus post bellum* discourse has emerged, as did its predecessor frameworks, without conscious attention being paid to gender as a constitutive dimension of post-conflict arenas, institutions and activities. Hence, if it is to add anything to the post-conflict terrain for women, it must start by paying analytical attention to the degree (if any) of gender consciousness and gender sensitivity in articulation of relevant and cohering norms. Larry May asks who is the intended person addressed by *jus post bellum* principles?<sup>58</sup> His attention is directed to the “average citizen,” who has little say in how wars are mounted or in the morality of a state’s conduct. But there is no such thing as the “average citizen,” and he certainly does not represent women. We suggest that close attention to the sex and the intersectionalities that accompany the citizen subject make a profound difference to determining the views of this “average citizen,” for whom post-conflict laws and constitutions are written and institutions are built, both in respect of the conduct of war and its aftermath.

There is more to be said here, but the short form of what we would propose starts from the premise that the building blocks of *jus post* require a *jus ad* and a *jus in*—this is not per se controversial and is generally presumed by liberal approaches to *jus post*<sup>59</sup> discourse. However, if we interrogate the solidity of the building blocks constituting

<sup>57</sup> Kristen Boon, “*Jus Post Bellum* in the Age of Terrorism: Introductory Remarks” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 331.

<sup>58</sup> May, *After War Ends* (n. 27) 5

<sup>59</sup> Foremost among these is Walzer, *Just and Unjust Wars* (n. 51). While Walzer does not address *jus post bellum* directly, he clearly affirms that there is justice in the goals of war, from which follows the presumption that the post-conflict execution of these goals weigh in any judgment of the war’s overall justice.

these two frameworks from a gender perspective, namely the extent to which either body of norms takes account of gendered roles, relationships and structures and the consequent harms that may befall both women and men in situations of armed conflict on account of gender, then some foundational shakiness is evident. A number of choices follow. The first is to recognize the genealogical deficiencies and to construct *jus post bellum* as a transformative framework that fully integrates gender analysis and specificity into its norm creation and consolidation. We do not here attempt to advance such gender integration into *jus post bellum*, but instead acknowledge that attempts have been made by feminist political theorists to develop a gendered conceptualization of the doctrine to varied success.<sup>60</sup>

The direction of much of the existing theory work is to locate an alternative vision of *jus post* in a feminist ethic of care, compassion, and relational dependency. Leaving aside the significant challenges of essentialism in a feminist ethic of care approach, our goal here is not to translate the corpus of legally based post-conflict capacity building through the prism of relational autonomy and care,<sup>61</sup> though our views on social services justice, articulated elsewhere<sup>62</sup> and noted above, could be viewed as one instrumentalization of this approach.

The second choice is to work within the status quo, with its inherent limitations, but to utilize the tools that have emerged to integrate a gendered analysis (the United Nations Security Council Resolutions, international criminal law, gendered programming and development awareness),<sup>63</sup> and attempt to move forward, integrating those tools into the existing framework. As we have argued elsewhere,<sup>64</sup> the international community has not yet successfully addressed women and gender in its humanitarian interventions or its post war operations. Nevertheless, as we have also elsewhere articulated,<sup>65</sup> there is some momentum being created that indicates that gender is squarely on the agenda of these actors. We believe that putting some pressure on the reformist impulses currently underway, set forth in the next section, is preferable to beginning anew, unless the “new” framework promises to centralize gender into its essence, and fulfills that promise through implementation.

#### IV. Current International Legal Responses to the Gender Dimensions of Conflict and Post-Conflict Processes

In the past 30 years, the international institutional infrastructure (comprised largely of the UN and other international agencies and donors) has sought to respond to intra-state, and, more frequently, inter-state, conflict through interventions designed to secure peace and advance related goals, including regional security, economic stability, and the recognition of human rights for all individuals. The process of “securing” peace

<sup>60</sup> See, Sjoberg “Paradox of Double Effect” (n. 52); Eide, “The Stigma of Nation” (n. 6); Ben-Porath, “Care Ethics and Dependence” (n. 45).

<sup>61</sup> On relational feminist theory, see Robin West, *Caring for Justice* (NYU Press 1999).

<sup>62</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) ch. 11.

<sup>63</sup> Haynes et al., “Women in the Post-conflict Process” (n. 20).

<sup>64</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17) 17.

<sup>65</sup> Haynes et al., “Women in the Post-conflict Process” (n. 20).

has no bright lines or demarcations, and so guaranteeing immediate peace often leads to a longer-term phase of stabilizing the country through post-conflict reconstruction processes and development. Decisions about what is included in, or left out of, *post bellum* processes are often made early during the peace negotiation phases.<sup>66</sup>

Historically, the actors involved in responding to violent conflict, securing peace, and reconstructing nations torn apart by conflict have failed to take into account the experiences and relevant contribution to peacemaking that women may have. Recent combined legal and political efforts on multiple fronts, including treaty recognition of gender-based violence,<sup>67</sup> robust jurisprudence from regional human rights treaties, and embedded policy initiatives through UN agencies (some newly created to address these issues),<sup>68</sup> have given rise to a larger discussion about the impact of conflict on women as a distinct group. Over the past half century, international actors, including and sometimes led by UN agencies specifically tasked with assessing the condition and status of women, began recognizing that women were excluded from many of the processes devised to end conflict and secure peace, and that their inclusion was desirable towards the UN objective of peace and security. In some sense therefore, without ignoring the pitfalls of international conflict feminism as a “player in global power politics,”<sup>69</sup> there are concrete and identifiable gains to be had for women. Including the presence of women in meaningful ways and securing their visibility in the transitional justice and post-conflict reconstruction frameworks that have emerged in recent decades creates a chance of concretely improving the post-conflict lives of women.

In particular, one relatively recent change is the UN Security Council’s passage of Resolution 1325, an initiative to “mainstream” women into post-conflict processes.<sup>70</sup> We can see various rationales for the adoption of SCR 1325, including: (1) consolidation of the Security Council’s legitimacy (albeit via “soft” law) after the peacekeeping debacles in both Rwanda and Bosnia/Herzegovina;<sup>71</sup> (2) the patriarchal political capital to be gained by action with respect to women’s rights after the same two human rights crises revealed systematic rape and sexual violence of women; and (3) a response to the concerted campaign by international women’s NGOs (the governance feminism shift by the international feminist movement to gain UN Security Council access), insisting that the Security Council take a normative stand on women’s rights in the context of armed conflict.

Over a period of 10 years, the Security Council adopted five more resolutions on women, peace, and security, aiming to “mainstream” women into all aspects of

<sup>66</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17).

<sup>67</sup> Declaration on the Elimination of Violence against Women, UN General Assembly (UNGA) Res 48/104, UN Doc. A/RES/48/104 (20 December 1993).

<sup>68</sup> UN Women was formed in 2010 as a super-agency dedicated to issues impacting women. In its first report, the agency listed as indicators of progress for women’s suffrage, recognized by only two countries in 1911 and now “virtually universal” (signifying political rights) and the signing of the Convention on the Elimination of All Forms of Discrimination against Women by 186 countries (signifying attention to economic, social, and cultural rights); the report also noted, however, widespread economic and labor insecurity, bias in legal systems, gender-based violence, and insufficient health care as ongoing and pervasive gendered concerns. UN Women, “Progress of the World’s Women (2011–2012)” (n. 2) 8–9.

<sup>69</sup> Nesiiah, “Feminism as Counter-Terrorism” (n. 3) 125; See also Otto, “The Exile of Inclusion” (n. 13).

<sup>70</sup> UNSC Res. 1325 (n. 19). <sup>71</sup> See Otto, “The Exile of Inclusion” (n. 13).

peacemaking, peacebuilding, and peacekeeping operations.<sup>72</sup> On the plus side, the adoption of these Security Council Resolutions formally acknowledged and addressed, at least rhetorically, the need to incorporate women into processes intended to secure peace. Also, because the UN Security Council is recognized and understood as the key global actor in the security arena, an actor whose resolutions are both determinative and binding as legal, political, and normative pronouncements, it was a powerful signal that these dimensions of harm to women were to be taken seriously by states and international institutions.

While we hope that Resolution 1325 and its successor resolutions bear fruit, we are mindful that tackling a highly selected menu of “women’s issues,” (with a primary and excessive focus on sexual violence) allows states adopting the resolution to maintain a comfortable and familiar role—as patriarchal protectors of women.<sup>73</sup> Bearing in mind the multiple dimensions of justice at play in such contexts, it remains striking the distributive justice remains well off the menu of issues and solutions to the causes conducive to the production of extreme violence against women in conflict situations, even as international institutions profess greater engagement with the harms experienced by women in war.

Assuming that a particular set of issues perceived to most acutely affect women are at least formally on the international agenda now, we are as yet unclear what the *jus post bellum* framework can do for women

## V. What *Jus Post Bellum* Might Add

The answer to whether the *jus post bellum* construct might add anything to the improvement of women’s lives in the aftermath of war depends both on (a) what women want (e.g. how one would measure and implement the justice demanded by women when asked), and (b) whether the conceptual and practical framework offered by *jus post bellum* offers new tools to address complex legal and political issues.

May suggests that there are six key principles of the *jus post bellum*: reconciliation, retribution, rebuilding, restitution, reparations, and proportionality.<sup>74</sup> Other scholars have argued that *jus post bellum* constitutes an umbrella concept that reaches to the law of peace, the law of occupation, the responsibility to protect, emergency law, transitional justice, and peacebuilding.<sup>75</sup> Each of these legal realms has an enormous reach in its own right, and several facets of these legal fields remain under construction, or

<sup>72</sup> UNSC Res. 1325 (n. 19) 2.

<sup>73</sup> See also Otto, “The Exile of Inclusion” (n. 13) (discussing additional factors for the adoption of SCR 1325 at this particular time). See also Sjöberg and Peet, “A(nother) Dark Side of the Protection Racket” (n. 54) 176 discussing how “belligerents justify wars as necessary to protect ‘their women and children’ both as innocent people themselves and as a symbol of the purity of the nation and the state.”

<sup>74</sup> May, *After War Ends* (n. 27).

<sup>75</sup> See e.g. Jennifer Easterday, “*Jus Post Bellum* in the Age of Terrorism: Remarks by Jennifer Easterday” (2012) 106 *Proceedings of the Annual Meeting (American Society of International Law)* 335 (arguing that “One of [*jus post bellum*’s] central goals is the establishment and maintenance of sustainable peace. The *jus post bellum* framework offers a way of unifying and reconceptualizing overlaps in laws that apply in post-conflict situations. It provides relational cohesion to its underlying laws and norms, and a basis for assigning responsibility for post-conflict obligation”).

are challenged to remain relevant in the ever-changing terrain of armed conflict itself.<sup>76</sup> There remains dispute among scholars as to the “known” nature of *jus post bellum* and the certainty of what its application means and requires.<sup>77</sup>

We caution that women might be particularly wary of hanging any hopes on a norm “under construction,” not least because it remains unclear to what degree and extent the concerns and needs of women are addressed by a body of norms designed to “bring together” existing legal practices, irrespective of the identified limitations of existing doctrines. There has been little if any engagement by feminist legal scholars with the *jus post bellum* arena, yet as noted throughout this article and articulated by us elsewhere, the post-conflict arena is axiomatically relevant to women.<sup>78</sup> There are collective interests at play in the aftermath of conflict for women that cut across jurisdictions and contexts. Some of these interests might be addressed by the institution of laws or accountability mechanisms, but others require multiple tools and processes to be simultaneously in effect, for example: systemic or pre-conflict physical and sexual violence; psychosocial and physical concerns impacting refugees and displaced persons; humanitarian aid dependency; lack of access to social and economic goods on an equal basis; exclusion from political processes; and lower legal, social, and economic status.<sup>79</sup>

A separate set of issues arises as to the identities and motives of the entrepreneurs advancing a theory and practice of *jus post bellum*.<sup>80</sup> Does the gender of the norm entrepreneurs matter? If so, how should feminist analysis and knowledge practices be included as a new doctrine comes into play? Feminist scholars have revealed the masculinity of the international legal order, showing how it produces hierarchy, exclusivity and reproduces public/private dichotomies that rarely work to women’s advantage. Hilary Charlesworth deftly captured an almost entirely one-sided conversation between feminist international law scholars and the mainstream, in which feminist theorizing and insight “is an optional extra, a decorative frill on the edge of the discipline.”<sup>81</sup> There is evident pessimism about the mainstream indifference to feminist interventions, and deepening unease that feminist scholarship will remain confined to backwater status no matter the legal doctrine employed, if women are not centralized into the creation and implementation of the relevant doctrine.

<sup>76</sup> Boon, “*Jus Post Bellum* in the Age of Terrorism” (n. 57) (arguing that *jus post bellum* “contains many norms and objectives that are not settled law, but are instead under construction”). For example, occupation law is challenged by what Adam Roberts has termed “transformative occupations.” Adam Roberts, “Transformative Military Occupation: Applying the Law of War and Human Rights” (2006) 100 *American Journal of International Law* 580. The law of peace has experienced significant evolution since the end of the Cold War. Christine Bell, *On the Law of Peace: Peace Agreements and the Lex Pacificatoria* (Oxford University Press 2008).

<sup>77</sup> Bass, “*Jus Post Bellum*” (n. 4).

<sup>78</sup> Haynes, Ní Aoláin, and Cahn, *On the Frontlines* (n. 17).

<sup>79</sup> Fionnuala Ní Aoláin, “Advancing Feminist Positioning in the Field of Transitional Justice” (2012) 6 *International Journal of Transitional Justice* 205.

<sup>80</sup> See generally, Catherine Powell, “The Role of Transnational Norm Entrepreneurs in the U.S. ‘War on Terrorism’” (2004) 5 *Theoretical Inquiries* 47.

<sup>81</sup> Hilary Charlesworth, “Talking to Ourselves: Feminist Scholarship in International Law?” in Sari Kovo and Zoe Peterson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (Hart Publishing 2011) 17.

As the train of *jus post bellum* thinking departs from the station, the same kinds of dynamics appear to be in play.<sup>82</sup> This is not to say that feminist scholars merely cry foul when a new theory makes an appearance without reference to women or to women's experiences. Rather, it is to say that critical engagement mandates that women are central in the production of norms, underscoring that the social construction of gendered norms is well understood and continues to reproduce itself in new norm creation. The unconscious presumption that the gender neutral Everyman employed when working out a new doctrine will meet the needs of both men and women no longer suffices.

When we insist that women be central to the creation of a new doctrine, we also wish to underscore the imperative of considering gender as one of many intersectionalities. *Jus post bellum* is a ripe field for intersectional analysis. Employing Larry May's "six normative principles of *jus post bellum*: rebuilding, restitution, reconciliation, restitution, and reparation as well as proportionality,"<sup>83</sup> for example, one can adduce a set of specific sites in which the dimensions of sex, age, sexual orientation, class, religion, ethnic identity and multiple other identities come together to shape individual and collective memory, articulation, and placement in the post-conflict site. Inevitably, identifying what women want and need in the post-conflict context is a delicate business. Any gender analysis must be particularly attuned to the intersectionality of women's experiences, not only conscious of their gender but also of their race, religion, family status, economic background, sexual orientation, and so forth. Despite this multiplicity of intersecting characteristics, women's complex and highly differentiated roles have too often, when thought of at all, been collapsed by the social and political dynamics of armed conflict. Accepting and accommodating a diverse range of roles for women in war and post-war facilitates a greater conceptual and practical understanding of the lived intersectionalities of most women's lives. An intersectional analysis integrated to any *jus post bellum* framework would both complicate and deepen the subjects of action in the post-conflict setting.

## VI. Conclusion

What is the right way to end a war? In a way that offers respite, and ideally improvement, in the lives of all of its citizens, not just some. For women, the transformation of a state from "conflicted" to "peaceful" risks being partial and exclusionary. The transition process itself may operate to cloak women's ongoing repression and inequality. Applying the gender lens is critical to ensuring the effectiveness of policies and practices involved in ending conflicts and ensuring that they do not recur. Without this attention, traditional gender dichotomies may be further entrenched and exacerbated during times of extreme violence and extended in the post-conflict phase.

We reflect on what a feminist vision of *jus post bellum* would look like. A feminist positioning would give prominence to a range of harms identified by those socially subjected to armed conflict and its aftermath. These would include retaining or

<sup>82</sup> Of course the inclusion of one paper in a collective devoted to identifying a feminist perspective may be seen to do some work in closing the gap.

<sup>83</sup> May, *After War Ends* (n. 27).

recapturing the agency of the subjects by including them in the process; advancing security from violence, discrimination, and oppression; promoting sexual health and reproductive freedom. It would also require a non-hierarchical vision of legal norms within the *jus post* analysis—one that does not automatically place political and civil rights at a hierarchical advantage. Drawing on the previous work of Charlesworth and Chinkin,<sup>84</sup> we reiterate that a feminist rethink could also undo the public/private division that has defined the identification and harnessing of and accountability for harms that occur in situations of armed conflict, but as yet we see no promise of a feminist rethink coming through adopting the *jus post bellum* framework.

Concentrating more rigorously on understanding how women experience harm and the manner in which law can facilitate and compound extremities of social and personal experience is a starting point for a female-centered understanding of conflict and the harms it causes to women. More concretely, we would look beyond harms to the body and think in broader terms. Only then can the full scope of harms experienced by women be adequately addressed by a post-conflict vision that is transformative.

Perhaps it matters less what we call this work, or the doctrine and theory under which it is done. What matters most is answering the questions—is the post-conflict moment one in which to attempt to improve women's status, power, and daily lives? Are the existing hard and soft laws and processes meeting those needs? We think all post-conflict moments are moments in which women's lives might be exponentially improved, because it is during this transitional moment—in which constitutions and laws are written and rewritten, in which economic projects are undertaken, in which labor markets are redefined, in which educational systems are built—that opportunities may open up for women.

<sup>84</sup> Charlesworth and Chinkin, "The Gender of Jus Cogens" (n. 53) 75.

